No. 82-1768

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH EDISON COMPANY,

Petitioner,

vs.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Charles A. Getto, individually and on behalf of all persons similarly situated, respectfully requests that this Court deny the PETITION FOR WRIT OF CERTIORARI seeking review of the Opinion of the Appellate Court of Illinois, reported in 109 Ill. App. 3d 498, 440 N.E. 2d 934 (1st Dist. 1982). [App. A, Pet.]

REASONS WHY THE WRIT SHOULD BE DENIED

1. Contrary to petitioner Edison's assertion that "this case presents a question not previously directly addressed by this Court" (pet. 7), a precisely similar question *was* presented for review by this Court by Illinois Bell Telephone Company (hereafter "Bell") in No. 81-1645, October Term 1981. The Court denied certiorari in *Illinois Bell Telephone Co.* v. *Getto*, 456 U.S. 946, 102 S. Ct. 2012, 72 L. Ed. 3d 468 (April 1982) on Bell's petition seeking review of an opinion by the Supreme Court of Illinois in *Getto* v. *City of Chicago, and Illinois Bell Telephone Company*, 86 Ill.2d 39, 426 N.E. 2d 844 (1981) [App. G, Pet.]

2. Petitioner Edison acknowledges that the state court's *interlocutory* turnover order is "similar" (indeed it is virtually identical) to the "attachment and sequestration order entered in the Bell action. 102 S. Ct. 2012." (Pet. 7). Edison purports to find a distinction from the Bell case on the ground that Bell failed to raise the constitutionality of the pre-judgment turnover order "prior to the Illinois Supreme Court's decision" and that "[t]hus the issue was not properly preserved for review in this Court." (Pet. 7, ft. nt. 6).

Contrary to Edison, Bell in its similar action *did* raise and preserve the constitutionality of the attachment-sequestration order by a timely petition for rehearing in the Illinois Supreme Court. Bell there made the same arguments and cited the same authorities as Edison does in the instant petition. Bell's petition for rehearing, denied by the Illinois Supreme Court, was set forth in App. G to Bell's Petition for Certiorari, in 81-1645. For the convenience of this Court, and to illustrate that Edi-

son's instant petition raises nothing new, excerpts from Bell's rehearing petition are set forth in respondent's App. I, *post*.

3. The Illinois Appellate Court felt constrained to affirm as a matter of *stare decisis*, Edison's appeal of the class action turnover order because of the Illinois Supreme Court's ruling in *Getto* v. *City of Chicago and Illinois Bell Telephone Co.*, 86 Ill. 2d 39, *supra* (referred to as Getto II).* The Illinois Appellate Court also noted this Court's denial of certiorari in *Getto II* in 456 U.S. 946, 102 S. Ct. 2012, 79 L. Ed. 3d 468. (App. A, Pet. p. 4a). The Appellate Court found Edison's appeal indistinguishable from the Illinois Bell action in *Getto II*.

Responding to Edison's arguments "that the trial court's order cannot stand as a final judgment on the merits, that the order cannot be upheld as a valid pre-judgment attachment of Edison's property, and that the order cannot be upheld as a valid exercise of the court's equitable jurisdiction" the state appellate court said:

> "We have considered the arguments raised by Edison in this case, and we do not feel that a detailed discussion would alter the outcome of this case in light of the language employed by the Illinois Supreme Court in *Getto II*. We are not persuaded by Edison's attempts to distinguish the decision in *Getto II* and view *Getto II to be controlling*. We hold that the trial court *did not abuse its discretion* in entering the 'turnover' order against Edison." (109 Ill. App. 3d at 501, App. A (pet. 5a)) (Emphasis added).

4. The Illinois Appellate Court also noted that Edison, the instant petitioner, was not a stranger to the Bell case

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* *Getto* v. *City of Chicago, et al.*, 77 Ill. 2d 346, 396 N.E. 2d 544 (1979), sustaining plaintiff's class action for overcharges of municipal occupational taxes on utility bills, is designated as *Getto I*.

and that Edison "filed an *amicus curiae* brief in *Getto II*. It appears that similar arguments to those raised here were considered." (109 Ill. App. 3d, *ibid*) (App. A, p. 5a).

5. Edison challenges the instant turnover order as a "pre-judgment attachment or sequestration" in violation of due process because there was no prior evidentiary hearing. (Pet. p. 8) Edison cites *North Georgia Finishing Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 607, 611; *Fuentes* v. *Shevin*, 407 U.S. 67, 93, 97; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343; *Hernandez* v. *Danaher*, 405 F. Supp. 757, aff'd Mem. Sub nom *Quern* v. *Hernandez*, 440 U.S. 951.

These are the very same authorities cited to the Court by Bell in 81-1645, cert. den'd 456 U.S. 946, *supra*. For the same reasons argued by respondent there, those authorities are not in point here. The cited cases, which strike down "summary creditor" remedies, are distinguishable from the instant case. In *North Georgia Finishing Inc.* the court invalidated a Georgia garnishment statute which permitted impounding of a bank account without "notice or opportunity for an early hearing and *without participation of a judicial officer.*" (419 U.S. 601, 606). (Emphasis added) In *Fuentes* the court held invalid replevin statutes of Florida and Pennsylvania which permitted a secured installment seller *ex parte* to repossess the goods sold "without notice or hearing, and *without judicial order or supervision.*" (419 U.S. at 606). (Emphasis added). But see *Mitchell* v. *W. T. Grant*, 416 U.S. 600, sustaining a Louisiana sequestration statute.

In the case at hand, the state court chancellor entered the turnover order following several hearings on the issue of a preliminary injunction. There was conclusive evidence—which Edison cannot genuinely dispute—that immediately after the Illinois Supreme Court in *Getto I*

(Oct. 1979) sustained the class action against the utility company for improperly including the Chicago occupational tax in the "gross receipts" on which the tax was imposed (i.e. a "tax on itself"), petitioner Edison filed revised rate schedules with the Illinois Commerce Commission (the Illinois utility regulatory agency). These supplemental schedules eliminated from Edison's rates the "tax on itself". The revision of the schedules was in effect a confession of past overcharges and convinced the state court chancellor of the strong probability of plaintiff's ultimate success in recovering the overcharges represented by the preliminary turnover order.

6. The Illinois Supreme Court in *Getto II* stressed that the turnover order as well as the class certification reviewed by the court were only *interlocutory* and subject to revision before final judgment. The court there said (86 Ill. 2d 39 at 55):

> "No determination has been made as to liability for overcharges. Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee. . . This order did not represent any determination of liability by the circuit court."

7. The purely *interlocutory* nature of the instant turnover order from which petitioner Edison seeks review, mitigates against granting certiorari at this stage. In the recent case, *Gillette Company* v. *Miner*, 456 U.S. 914, 102 S. Ct. 1767, the Court granted certiorari to review the decision of the Illinois Supreme Court in *Miner* v. *Gillette Co.*, 87 Ill. 2d 7, 448 N.E. 2d 478, which had sustained a consumer class action. The case however had not been adjudicated to final judgment. After ordering briefs and

hearing oral argument, this Court entered the following *per curiam* order:

> "There being no *final judgment*, the writ of certiorari is dismissed for want of jurisdiction." ..... U.S. ....., 103 S. Ct. 484 (Dec. 1982). (Emphasis added).

There is no final judgment in the instant case.

8. The turnover order entered by the state chancery court may be compared to a receivership *pendente lite* where a sequestered fund is placed under the control of a court-appointed and supervised receiver. In 4 Pomeroy, *Equity in Jurisprudence*, (5th Ed. 1941) it is stated at sec. 1330:

> "A receiver is a person standing indifferent between parties, appointed by the Court as a quasi officer or representative of the Court, to hold, manage, control, and deal with the property which is the subject matter of or involved in the controversy, under the direction of the Court during the continuance of the litigation."

(a) In language pertinent to the instant case, Pomeroy states, sec. 1331:

> "One of the most material circumstances, without which the Court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receivership will ultimately succeed in obtaining the general relief sought by his suit."

Here, the chancellor found a strong likelihood that plaintiff would ultimately succeed in the instant class action to recover utility overcharges.

(b) Echoing familiar chancery doctrine, the Supreme Court of Illinois stated in *Chicago Title & Trust Co.* v. *Mack*, 47 Ill. 480 (1932) at 483:

> "The appointment of a receiver is a branch of equity jurisdiction, not dependent upon any statute and rests

largely in the discretion of the appointing court. It had its origin in the English Court of Chancery at an early date, and it was incidental to and in aid of the jurisdiction of equity to enable it to accomplish, as far as practicable, complete justice among the parties before it, the object being to secure and preserve the property or thing in controversy *for the benefit of all concerned* pending the litigation, so that it might be subjected to such order or decree as the Court might make or render." (Emphasis added).

9. Petitioner's citation of this Court's rejection of a pre-judgment sequestration in *DeBeers Consolidates Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945) (Pet. 12) is inapposite. There this Court reversed an injunction restraining defendants from withdrawing, selling, transferring or disposing of any property belonging to them in the United States. The Court found that the order *dealt with matters wholly outside the issues in the case,* dealt with property which could not under any circumstances be dealt with in the Court's final order, and was therefore without proper jurisdiction or authority.

The turnover order in the case at bar does not resemble the *De Beers* injunction, in scope or in substance. The turnover order does not deal with funds which are irrelevant to the issues in the case. The funds represent alleged overcharges to the class of Edison customers represented by plaintiff. Unlike *DeBeers* the instant turnover order does not impose a blanket restriction on Edison's use of all of its property. An interlocutory turnover order requiring the deposit of certain funds which are the subject of litigation is not deemed a "prejudgment attachment". See: *American Reinsurance Company* v. *MGIC Investment Corporation*, 73 Ill. App. 3d 316 (1st Dist. 1979) distinguishing *DeBeers Consolidated Mines, Ltd.* v. *United*

States, 325 U.S. 212, supra. The Court in *American Reinsurance* said, at p. 325:

> "The funds covered by the deposit orders are the amounts due from plaintiff to defendants and those paid by defendants to plaintiff. They are clearly subject to disposition by the Court as part of its final order [yet to be entered]. Similarly, the orders *do not amount to an 'equitable attachment' . . . the fund at issue is composed of moneys whose past and future payment under the reinsurance treaty is in dispute and whose disposition will be dealt with in the trial court's final order.* We cannot agree that by *taking steps to insure that the moneys are preserved until the final ruling*, the Court abused the exercise of its equitable discretion." (Emphasis added).

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix Follows

APPENDIX

APPENDIX A

Excerpts From Illinois Bell's Petition For Rehearing In The Illinois Supreme Court, in 86 Ill. 2d 39 (1981)

App. G to Bell's Petition for Certiorari in 81-1645

* * *

THE DUE PROCESS PROBLEMS ARISING FROM THE INCONSISTENCY OF THIS OPINION

It is a violation of person's due process rights to have his property seized *pendente lite*[2] unless such action is authorized by a law which requires an initial factual showing by the plaintiff that sufficient grounds exist to justify the seizure and provides notice and an evidentiary hearing at a meaningful time. *See e.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, (1969) (Wisconsin pre-judgment garnishment seizure of wages without notice and prior hearing violated a person's right to due process); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (pre-judgment seizures under states' replevin statutes violated a person's right to due process because there was no requirement that the plaintiff make an initial factual showing that adequate grounds existed to justify the seizure); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) (validity of a pre-judgment seizure under a Louisiana sequestration act upheld because it required the creditor to make an initial showing that he was entitled to pre-judgment relief and it provided a full hearing within a meaningful time); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, (1975) (cor-

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[2] That the deprivation is only of the use of property, and perhaps only temporarily, does not put the seizure beyond scrutiny under due process clause. "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the state is within the purview of due process clause." *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601, 606 (1975) *quoting Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

poration's right to due process violated when its bank account was garnished without a pre-seizure showing that reasonable grounds existed to support the seizure).

Additionally, it is well established that pre-judgment attachment is purely a statutory remedy. For example, in *Harris* v. *Balk*,[3] 198 U.S. 215 (1905) the United States Supreme Court stated:

> Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied.

198 U.S. at 222. The same year, this Court in *Gilbert* v. *Funk*, 214 Ill. 237 (1905) echoed the same theme:

> The only authority for the issuance of an attachment writ and the seizure of property thereunder is the alleged existence of some statutory ground of attachment. In the absence of such ground the right to seize property in advance of the rendition of a judgment and the issuance of execution thereon does not exist.

214 Ill. at 240-41. *See also*, *Martin* v. *Schillo*, 389 Ill. 607 (1945); *Apollo Metals, Inc.* v. *Standard Mirror Co.*, 87 Ill.App.2d 383 (1967).

In other words, as this Court held in *Dunham* v. *Kauffman*, 385 Ill. 79 (1944), a pre-judgment attachment will not lie to aid a suit in equity.

> In earlier cases in Illinois, it was held that there is no such thing as equitable attachment. . . .
>
> In Illinois the real distinction between law and equity still exists and there is no authority for issuing a writ of attachment in an equity proceeding based upon facts and circumstances such as appear in this case. . . .

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[3] This case was overruled on other grounds in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

> [T]here is a lack of specific statutory authority for the issuance of an attachment in aid of a purely equitable suit prior to judgment. . . .

385 Ill. at 85-6. *See also, Bigelow* v. *Andress*, 31 Ill. 322 (1863).

The Illinois Attachment Act, therefore, is the authority that permits a party to obtain a pre-judgment property seizure *pendente lite*. Ill. Rev. Stat. ch. 11, §§ 1 *et seq.* (1979). Section 1 of the act provides the only substantive grounds for attachment: where the debtor is a non-resident, has attempted to evade process, has fled or is about to flee the jurisdiction, is about to remove his property from the jurisdiction, has within two years fraudulently conveyed or concealed his property to the detriment of his creditors, or where the debt sued for was fraudulently induced by a written statement. Section 2 requires the party seeking the attachment to file an affidavit which shows, among other things, the facts establishing one or more of the grounds set forth in Section 1. Section 4a requires that the plaintiff secure a bond in double the sum sworn to be due. An attachment issued without a bond is illegal and void.

Of particular significance to this case is *Quern* v. *Hernandez*, 440 U.S. 951 (1979) in which the United States Supreme Court summarily affirmed the decision of a three-judge district court which held the prior Illinois attachment statute unconstitutional because, *inter alia*,:

> [T]he, the Illinois Act does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief.

Hernandez v. *Danaher*, 405 F.Supp. 757, 762 (N.D. Ill. 1975).

In this case, the plaintiff has made no attempt, by affidavit or otherwise, to demonstrate why he is entitled to

pre-judgment relief, and the record is void of any statutory grounds to justify this Court's approval of a pre-judgment attachment order.

Assuming *arguendo* that this Court intends to overrule *Dunham* v. *Kauffman, supra*, and create an equitable attachment, it is respectfully submitted that the constitutional requirements of due process and equal protection would still apply. In fact, regardless of the characterization placed on Judge O'Brien's turn-over order, these constitutional requirements must be satisfied. And in this case, there are absolutely no facts in the record to justify this pre-judgment seizure of Illinois Bell's property under any theory.

We are not unmindful of the provisions of Supreme Court Rule 367, however, we respectfully suggest that the due process issue raised by this Petition for Rehearing is of such significance that oral argument on this issue would be helpful to the Court.

CONCLUSION

By affirming the trial court's order requiring Illinois Bell to make, "as expeditiously as possible," a multi-million dollar, pre-judgment deposit *pendente lite* of all overcharges collected during a ten-year period while, at the same time, rejecting the grounds upon which the trial court's order was based, this Court has created an inconsistency which goes to the very heart of Illinois Bell's rights to due process and equal protection guaranteed by the State and Federal Constitutions.

WHEREFORE, Illinois Bell Telephone Company, defendant-appellant, respectfully requests this Honorable Court to reverse that portion of Judge O'Brien's order which requires Illinois Bell to make a pre-judgment deposit *pendente lite* of all overcharges collected during the ten-year period prior to the filing of plaintiff's complaint.